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No. 455

In the Supreme Court of the United States

OCTOBER TERM, 1930

ANNIE G. PHILLIPS ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT

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MEMORANDUM FOR THE RESPONDENT

The respondent does not oppose this petition.

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 23–27) is reported in 15 B. T. A. 1218. The opinion of the Circuit Court of Appeals (R. 40–45) is reported in 42 F. (2d) 177.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 16, 1930. (R. 46.) Petition for a writ of certiorari was filed September 13, 1930.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

(1) Whether Section 280 of the Revenue Act of 1926 is constitutional.

(2) Assuming that Section 280 is constitutional, whether the transferee of the assets of a dissolved corporation is liable for the unpaid taxes of the corporation to the extent of the amount which he received upon liquidation or only for a pro rata share thereof.

STATUTE INVOLVED

Section 280 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 61 (U. S. C. App., Title 26, Sec. 1069), provides, in part, as follows:

> SEC. 280. (a) The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):
>
> (1) The liability, at law or in equity, of a transferee of property of a taxpayer, in re-

spect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this title or by any prior income, excess-profits, or war-profits tax Act.

* * * * * *

(f) As used in this section, the term "transferee" includes heir, legatee, devisee, and distributee.

STATEMENT

In September, 1919, the Coombe Garment Company, a Pennsylvania corporation, was dissolved and all its property was distributed among its eleven stockholders in proportion to their respective holdings. Prior thereto the corporation had filed its income and profits tax returns and paid the taxes therein indicated for the years 1918 and 1919. Subsequently a deficiency tax for each of these years was assessed against the corporation, and on June 16, 1926, the Commissioner notified I. L. Phillips, one of the stockholders, that he proposed to assess against him, as a transferee of part of the assets of the Coombe Garment Company, the entire amount of the deficiency taxes, pursuant to Section 280 of the Revenue Act of 1926. Phillips had received as liquidating dividends more than the amount of the deficiency taxes. No proceeding was initiated by the Commissioner to assess or col-

lect the deficiency taxes from any other stockholder of the dissolved corporation. (R. 24–26.)

The executors of the estate of I. L. Phillips, deceased, petitioned the Board of Tax Appeals for a redetermination (R. 4), and the Board confirmed the Commissioner's action (R. 27). Thereupon the executors filed a petition for review with the Circuit Court of Appeals for the Second Circuit (R. 29) which court affirmed the order of the Board of Tax Appeals (R. 46).

DISCUSSION

The only other Circuit Court of Appeals which has passed upon the constitutionality of Section 280 of the Revenue Act of 1926 (p. 2, *supra*) upheld it. *Rontzahn* v. *Tyroler*, 36 F. (2d) 208 (C. C. A. 6th). Two District Courts have held that it violated Section 1 of Article III of the Constitution and the Fifth Amendment. *Owensboro Ditcher and Grader Co.* v. *Lucas*, 18 F. (2d) 796 (W. D. Ky.); *Mid-Continent Petroleum Corp.* v. *Alexander*, 35 F. (2d) 43 (W. D. Okla.). See also *Felland* v. *Wilkinson*, 33 F. (2d) 961, 962 (W. D. Wis.).

On the question of the extent of the liability of a transferee of the assets of a dissolved corporation, the decision in the instant case appears to be in conflict with that of the Circuit Court of Appeals for the Eighth Circuit in *United States* v. *Armstrong*, 26 F. (2d) 227.

Both questions are important and are present in many pending cases. Consequently we do not oppose the instant petition.

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